

Attorney Docket No.: J6860(C)
Serial No.: 10/682,657
Filed: October 9, 2003
Confirmation No.: 8243

BRIEF FOR APPELLANT

Sir:

This is a Brief for Appellant's Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our Deposit Account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Conopco, Inc., d/b/a Unilever, a corporation of the State of New York, said Real party formally doing business as Unilever Home & Personal Care USA, Division of Conopco, Inc.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellant, his legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

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III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1 through 24, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

An Amendment after the Final Rejection was filed on 3 August 2009. The Amendment was entered by the Examiner for purposes of this Appeal.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The inventions set forth in the claims on appeal are directed to cosmetic compositions that can provide for the consumer desired optical properties of

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radiance, without opacifying natural skin color. Independent claim 1 describes a skin care or cleansing composition comprising particles and the particles consist essentially of solid single-crystal, flat, platy particles. Independent claim 15 is directed to a method of imparting a radiant skin appearance by using and applying the composition of claim 1. Independent claim 16 is directed to a non-pigmented or colorless cosmetic skin care composition with particles that consist essentially of solid single-crystal, flat, platy particles.

By the presently claimed inventions, therefore, superior cosmetic compositions for imparting radiant characteristics have been discovered. As may be readily gleaned from the Examples set forth in the specification as originally filed, the claimed compositions unexpectedly result in reflective radiance when being used by a consumer.

In the Specification, the portion at page 1 is background. The phraseology used in independent claims 1, 15 and 16 may be found, for example, on pages 2 and 3 of the specification as originally filed. Support for dependent claims 2, 3, 4, 5, 6

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and 8 may be found on pages 4 through 6 of the specification. Support for claims 7, 9, 10 and 11 may be found in the specification on pages 3-4, 7, 2, and 9, respectively. Claims 12-14 are supported by originally filed language found on pages 9-10 of the specification. Dependent claims 17-24 are supported by originally filed language on pages 2-10 of the specification. Beginning at page 15, working examples illustrate the unexpected and superior properties obtained when using the compositions of this invention.

VI. GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The issues raised in this appeal are primarily ones of fact and of the type normally encountered in connection with a rejection made under 35 USC § 102 and § 103. In particular, the issues are as follows:

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I. Would one of ordinary skill in the art, upon reading Grollier et al. (U.S. 5,000,937) as evidenced by Andrean et al. (U.S. 5,205,837), find claims 1-13 and 15-24 anticipated;

II. Would one of ordinary skill in the art, upon reading Grollier et al. and Andrean et al. find claim 14 obvious under 35 USC §103;

III. Would one of ordinary skill in the art, upon reading Nagatani et al. (2002/0176833) find claims 1-3, 5-9, 11-13, 15-17, 19-20 and 23-24 obvious under 35 USC §103;

IV. Would one of ordinary skill in the art, upon reading Nagatani et al. in view of Dreher (2003/0157041) find claims 4, 10 and 18 obvious under 35 USC §103; and

V. Would one of ordinary skill in the art, upon reading Nagatani et al. in view of Tan (U.S. 6,511,672) find claims 13 and 14 obvious under 35 USC §103?

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VII. ARGUMENT

I. Rejection Under 35 USC §102(b)

The Examiner has rejected claims 1-13 and 15-24 under 35 USC §102(b) and suggests the same are anticipated by Grollier et al., U.S. Patent No. 5,000,937 as evidenced by Andread et al., U.S. Patent No. 5,205,837, hereinafter, '937 and '837, respectively.

In the rejection, the Examiner maintains, in summary, that the '937 reference discloses transparent cosmetic compositions for protecting the human epidermis against infrared radiation, where the composition comprises an acceptable vehicle, an effective amount of at least one substance that reflects infrared radiation, hollow glass microspheres of particle size less than 100 microns, bismuth oxychloride of particle size less than 75 microns, and zirconium powder-covered ceramic microparticles of particle size less than 8 microns. The Examiner further maintains that the composition is a water-in-oil emulsion having in addition to the infrared-reflecting agent, fatty alcohols, fatty acid esters, fatty acids, lanolin, natural or synthetic oils or waxes and emulsifiers. Finally, and again, the Examiner maintains that the bismuth oxychloride provided has an average particle size from 6-10 microns.

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The Examiner relies on the '837 reference for showing that bismuth oxychloride sold under the name PEARL GLO is a lamellar particle in structure. In view of this, the Examiner continues to believe that the novelty rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position, again, that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record on numerous occasions, the invention presented in independent claim 1 is directed to a skin care or cleansing composition comprising particles that consist essentially of a solid single-crystal, flat, platy particle, the particle making up from about 0.1% to about 1% by wt. of the composition. Such particles have an index of refraction from about 1.8 to about 2.2, and the composition further comprises a cosmetically acceptable vehicle whereby the composition has an opacity of less than about 20%. Independent claim 1 clarifies that particle present consists essentially of single-crystal flat, platy particle.

The invention of claim 1 is further defined by the dependent claims, which claim, among other things, that the opacity of the composition can be less than about 10%, the type of platy particles selected, the size of the platy particles, the thickness of the platy particles, that the composition can be leave on or wash

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off, the amount of platy particles used in the composition, that the composition can comprise a skin benefit agent, the amount of skin benefit agent that may be used and the type of skin benefit agent that may be used. Claim 21 further characterizes the composition of claim 1 whereby the particles can consist of solid-crystal flat, platy particles. Claim 23 further defines the particles of claim 1 in that the particles further comprise smooth-crystal facets.

As made of record on numerous occasions, independent claim 15 is directed to a method of imparting a radiant skin appearance by applying to the skin the composition of claim 1.

Independent claim 16, again, is directed to a skin care composition comprising about 0.01% to about 1.0% by weight particles whereby the particles consist essentially of solid single-crystal, flat, platy particles, the particles having an index of refraction of about 1.8 to about 2.2. The composition comprises a cosmetically acceptable vehicle wherein the composition has an opacity of less than about 20% and further wherein the composition is non-pigmented or colorless.

The invention of independent claim 16 is further defined by the dependent claims which claim, among other things, the type of platy particles used, the diameter of the platy particles and the thickness of the platy particles. Claim 22 further defines the particles used in the composition as particles which consist of

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the solid single-crystal, flat, platy particle. Claim 24 further defines the particles of claim 16 in that the same comprise smooth-crystal facets.

In contrast, and as already made of record, the '937 reference is merely directed to transparent cosmetic compositions that reflect infrared radiation. Again, turning to column 2 of the '937 reference at lines 17-24, described is a composition that can have a diatom of a particular particle size, hollow glass microspheres, bismuth oxychloride of unspecified form, and zirconium powder covered ceramic microparticles. Appellant respectfully wishes to point out, again, that bismuth oxychloride is available in many forms and often used in cosmetics in the powdery form. Components in the powdery form are known to be opacifiers, and therefore, prohibit the radiance effect sought after and achieved in the present invention. Clearly, nothing in the '937 reference even remotely suggest or describes a skin care or cleansing composition having particles whereby the particles within a desired composition consist essentially of solid single-crystal, flat, platy particles. Moreover, nothing in the '937 reference even remotely suggests that such particles may consist of solid single-crystal, flat, platy particles.

Turning to the '837 reference, again, the same does not cure the deficiencies of the '937 reference. The '837 reference merely mentions the use of lamellar particles. Lamellar particles can be thin and plate-like, but lamellar does not mean solid, single-crystal, flat platy particles as claimed in the present

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invention. In view of this, it is clear that all the important and critical limitations set forth in the presently claimed invention are not found in a single reference, namely the '937 reference. Therefore, it is respectfully requested that the novelty rejection be withdrawn and rendered moot.

II. Rejection Under 35 USC § 103

The Examiner continues to reject claim 14 under 35 USC § 103 as being unpatentable over Grollier et al., U.S. Patent No. 5,000,937 and Andrean et al., U.S. Patent No. 5,205,837, (hereinafter, '937 and '837, respectively) for the reasons discussed above and relating to claims 1-13 and 15-24 above. While the Examiner admits that the '937 reference does not teach the specific benefit agents of claim 14, the Examiner mentions that the reference does disclose the use of linoleates for the purpose of promoting oil retention and salicylates useful for UV screening agents capable of being used in transparent cosmetic compositions. In view of the above, the Examiner continues to believe that it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate specific benefit agents. Thus, the Examiner continues to believe that the obviousness rejection to claim 14 is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position, again, that the presently claimed invention set forth in

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claim 14 is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the invention of claim 1 is directed to a skin care or cleansing composition whereby the composition has particle consisting essentially of solid single-crystal, flat, platy particles. Since, for the reasons already mentioned, the '937 reference and the '837 reference do not, even remotely, describe a skin care composition having particles whereby the particles consist essentially of solid single-crystal, flat, platy particles, it is clear that a *prima facie* case of obviousness has not been established. Therefore, the rejection to claim 14 under 35 USC § 103 is misplaced and should be withdrawn.

III. Rejection Under 35 USC § 103

The Examiner maintains the rejection to claims 1-3, 5-9, 11-13, 15-17, 19-20 and 23-24 under 35 USC § 103, and continues to allege that the claims are unpatentable over Nagatani et al., U.S. Patent Application No. 2002/0176833 (hereinafter, '833). In the rejection, the Examiner continues to maintain, in summary, that the '833 reference describes pigmented and non-pigmented cosmetic compositions having 0.1-30% by weight of hollow plate metal oxide particles (zirconium oxide) that have an average particle diameter of 5-12 microns, and inorganic particles having platy structure and a refractive index of 1.6-1.8 and a total transmittance of at least 85%. The Examiner mentions and

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believes that the compositions described in the '833 reference yield an excellent feeling of transparency, brightness and natural finish. The Examiner also continues to mention that the '833 reference does not explicitly teach the claimed opacity of the composition (i.e., less than 20%) but again concludes that it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine "..., an optimal and workable opacity of the composition through routine experimentation." In view of this, the Examiner again concludes that the rejection made in view of the above-identified references under 35 USC § 103 is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Appellant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

The present invention as set forth in independent claim 1, as presented and now further clarified, is directed to a skin care or cleaning composition comprising 0.01% to about 1.0% by weight particles, the particles consisting essentially of solid single-crystal, flat, platy particles, and having an index of refraction from about 1.8 to about 2.2. The composition further comprises a cosmetically acceptable vehicle, wherein the composition, again, has an opacity of less than about 20%.

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The invention of claim 1 is, again, further defined by the dependent claims which claim, among other things, that the opacity of the composition can be less than about 10%, the type of platy particles selected, the size of the platy particles, the thickness of the platy particles, that the composition can be leave on or wash off, the amount of platy particles used in the composition, that the composition can comprise a skin benefit agent, the amount of skin benefit agent that may be used and the type of skin benefit agent that may be used. Claim 21, again, further characterizes the composition of claim 1 whereby the particles consist of solid single-crystal, flat, platy particles. Claim 23 further characterizes the particles as those which comprise smooth-crystal facets.

As already made of record on numerous occasions, independent claim 16 is directed to a skin care composition comprising 0.01% to about 1.0% particles that consist essentially of solid single-crystal, flat, platy particles. The particles have an index of refraction of about 1.8 to about 2.2 and a cosmetically acceptable vehicle wherein the composition has an opacity of less than about 20% and further wherein the composition is non-pigmented or colorless.

The invention of claim 16 is, again, further defined by the dependent claims which claim, among other things, the type of platy particles used, the diameter of the platy particles and the thickness of the platy particles. Claim 22 further defines the particles used in the composition as particles which consist of the

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solid single-crystal, flat, platy particle and claim 24 characterizes the particles as those which comprise smooth-crystal facets.

In contrast, and as already made of record on numerous occasions, the '833 reference merely discloses a cosmetic composition having metal oxide plate powder with a hollow structure. The cosmetic composition described provides a feeling of transparence by causing a remarkable change in hue. Appellant respectfully wishes to point out that Figure 2 of the '833 reference is an electron microscope photograph of metal oxide plate powder that is used. As can be seen from the figure, hollow platelets are made up of multiple crystals. Since they are made of multiple crystals, the hollow platelet surface, for example, is not smooth, and the reference does not disclose the use of single-crystal, flat, platy particles as claimed in the present invention.

Paragraph 27 of the '833 reference clearly mentions that when inorganic powder having a refractive index of 1.6-1.8 is used, such a component is used at a concentration of 20% by weight. Appellant respectfully points out to the Examiner that when particles having an index of refraction of 1.8-2.2 are used in the composition of the invention as claimed, about 0.01% to about 1.0% by weight of the solid single-crystal, flat, platy particles are used. Twenty percent (20%) is not used in the claimed invention as described in the '833 reference. In fact, the claimed invention uses at least 20 times less! Furthermore, the cosmetic compositions described in the '833 references require hollow plate powder (A)

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so that various color tones may be prepared. The present invention, again as presented, does not require hollow plate powders to generate various color tones. Again, the compositions of the present invention provide a radiant appearance to skin and a colorless or natural skin finish.

In view of the above, it is clear that all of the important and critical limitations set forth in the presently claimed invention are not found in the '833 reference. For the reasons above, the '833 reference teaches away from the claimed inventions as presented. Therefore, the rejection made under 35 USC § 103 should be withdrawn and rendered moot.

IV. Rejection Under 35 USC § 103

The Examiner again rejects claims 4, 10 and 18 under 35 USC § 103 as being unpatentable over Nagatani et al., U.S. Patent Application No. 2002/0176833 (hereinafter, '833) in view of Dreher, U.S. Patent No. 2003/0157041 (hereinafter, '041).

In the rejection, the Examiner again relies on the '833 reference for the reasons made of record. The Examiner continues to acknowledge that the '833 reference does not describe the use of bismuth oxychloride. However, the

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Examiner continues to rely on the '041 reference which mentions that plate-like bismuth oxychloride particles may be used in compositions.

In view of the above, the Examiner continues to conclude that it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the compositions of the '833 reference and to use bismuth oxychloride in lieu of particles like boron nitride or barium sulfate. Thus, the Examiner continues to believe that claims 4, 10 and 18 are appropriately rejected under 35 USC §103.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position, again, that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, independent claims 1 and 16 are directed to specific skin care or cleaning compositions with solid single-crystal, flat, platy particle having an index refraction of 1.8 to about 2.2 whereby the particle is present within the composition at an amount from about 0.01% to about 1.0%. As presented, the particles in the composition defined in claim 1 consist essentially of such solid single-crystal, flat platy particles. Claim 21 characterizes the particles as those consisting of solid single-crystal, flat platy particles. Claims 23 and 24 further characterize the particles as those comprising smooth-crystal facets.

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As already made of record on numerous occasions, the '833 reference merely discloses a cosmetic composition requiring metal oxide plate powder with a hollow structure. Again, Figure 2 of the '833 reference shows hollow platelets of multiple, not single crystals. The '833 reference clearly mentions that when inorganic powder having a refractive index of 1.6 -1.8 is used, such a powder is used at a concentration of about 20% by weight. Since the amount employed in the compositions of the '833 reference is significantly higher than those claimed in the present inventions, the combination of the '833 reference with the '041 reference does not render the claimed invention obvious. Moreover, and as already made of record, the compositions described in the '833 references require such hollow plate powders to generate various color tones. Again, the present invention is directed to compositions that impart a radiant appearance to the skin with a colorless or natural skin finish. The '041 reference cures none of the vast deficiencies of the '833 reference since it is directed to an optical make-up composition having an interference pigment with blue or violet reflectants. Furthermore, since claims 4 and 10 depend from independent claim 1 and claim 18 depends from independent claim 16, all of the limitations set forth in the claimed inventions as they relate to claims 4, 10 and 18 are not found in the combination of references relied on by the Examiner. Therefore, Appellant respectfully requests, again, that the obviousness rejection be withdrawn and rendered moot.

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V. Rejection Under 35 USC §103

The Examiner continues to reject claims 13 and 14 under 35 USC §103 as being unpatentable over Nagatani et al., U.S. Patent Application No. 2002/0176833 (hereinafter, '833) in view of Tan et al, U.S. Patent No. 6,511,672. In the rejection, the Examiner continues to conclude, in summary, that the '833 reference is applied for the reasons set forth as above and that the '672 reference is relied on for showing that skin benefit agents such as vitamins and other skin benefit agents may be employed in topical compositions. In view of this, the Examiner continues to believe that the rejection made to claims 13 and 14 under 35 USC §103 is appropriate.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellant's position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, independent claim 1 is directed to a skin care cleansing composition with about 0.1 to about 1.0% by weight solid single-crystal, flat, platy particle where the particle has an index of refraction of about 1.8 to about 2.2. Particle employed in the claimed invention consists essentially of solid single-crystal flat, platy particle. The '833 reference is directed to a composition that comprises 20% by weight inorganic powder having a refractive index of 1.6-1.8. Moreover, and again, the '833 reference describes the use of

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hollow platelets made up of multiple and not single crystals. Again, the compositions of the '833 reference require such hollow plate powders for the generation of various color tones.

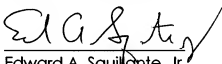
Again, for the reasons made of record, none of the important and critical limitations set forth in the presently claimed invention are even remotely found in the '833 reference and claims 13 and 14 are dependent from independent claim 1. Furthermore, the '672 reference cures none of the deficiencies of the '833 reference since the same merely describes a composition having a pigment with a first platelet of aluminum treated with a metal oxide and blended with at least one second platelet treated with at least one spherical scattering component. Again, none of the vast deficiencies of the '833 reference are even remotely cured by the '672 reference. In view of this, Appellant respectfully requests that the obviousness rejection be withdrawn and rendered moot.

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VIII. CONCLUSION

Appellant respectfully requests that the Board of Patent Appeals and Interferences reverse the Examiner's final rejections of claims 1-24 made under 35 USC §102(b) and/or under 35 U.S.C. §103.

Respectfully submitted,



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IX. CLAIMS APPENDIX

1. (previously presented) A skin care or cleansing composition comprising:
(a) particles, the composition comprising from about 0.01 % to about 1 % by weight of said particles whereby the particles consist essentially of solid single-crystal, flat, platy particles;

said particles having an index of refraction of about 1.8 to about 2.2;
and

(b) a cosmetically acceptable vehicle;

wherein said composition has an Opacity of less than about 20%.
2. (original) The composition of claim 1 having an Opacity of less than about 10 %.
3. (original) The composition of claim 1, wherein said platy particles are selected from the group consisting of bismuth oxy-chloride, aluminum oxide, zirconium oxide, boron nitride, crystals of solid phase solutions, and mixtures thereof.

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4. (original) The composition of claim 1, wherein said platy particles are bismuth oxy-chloride.
5. (original) The composition of claim 1, wherein said platy particles have a particle diameter of about 10 micro-meters to about 30 micro-meters.
6. (original) The composition of claim 1, wherein said platy particles have a particle thickness of about 0.1 micro-meters to about 5 micro-meters.
7. (original) The composition of claim 1, that is a leave-on or wash-off composition.
8. (original) The composition of claim 1, wherein said platy particles comprise about 0.05 % to about 0.5 % by weight of said composition.
9. (original) The composition of claim 1, wherein said platy particles comprise about 0.1 % by weight of said composition.
10. (original) The composition of claim 1, wherein said platy particles are contained suspended in a polar solvent prior to incorporation in said composition.

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11. (original) The composition of claim 1, further comprising a skin benefit agent.
12. (original) The composition of claim 11, wherein the amount of said skin benefit agent is at least about 0.0001% by weight of the composition.
13. (original) The composition of claim 11 wherein the skin benefit agent is selected from the group consisting of retinoids, essential fatty acids, alpha-hydroxy acids, beta-hydroxy acids, poly-hydroxy acids, skin lightening agents, and mixtures thereof.
14. (original) The composition of claim 11 wherein said skin benefit agent is selected from the group consisting of retinol, linoleic acid, glycolic acid, lactic acid, 2-hydroxyoctanoic acid, salicylic acid, ferulic acid, sebacic acid, and combinations thereof.
15. (original) A method of imparting radiant skin appearance by applying to the skin the composition of claim 1.
16. (previously presented) A cosmetic skin care composition comprising from:
 - (a) about 0.01 % to about 1 % by weight particles whereby the particles consist essentially of solid single-crystal, flat, platy particles;

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said particles having an index of refraction of about 1.8 to about 2.2;
and

(b) a cosmetically acceptable vehicle;

wherein the composition has an Opacity of less than about 20%; and

wherein said composition is non-pigmented or colorless.

17. (original) The composition of claim 16, wherein said platy particles are selected from the group consisting of bismuth oxy-chloride, aluminum oxide, zirconium oxide, boron nitride, crystals of solid phase solutions, and mixtures thereof.
18. (original) The composition of claim 16, wherein said platy particles are bismuth oxy-chloride.
19. (original) The composition of claim 16, wherein said platy particles have a particle diameter of about 10 micro-meters to about 30 micro-meters.

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20. (previously presented) The composition of claim 16, wherein said platy particles have a particle thickness of about 0.1 micro-meters to about 5 micro-meters.
21. (previously presented) The composition of claim 1 wherein the particles consist of from about 0.01% to about 1% by weight of said composition of solid single-crystal, flat, platy particles.
22. (previously presented) The composition of claim 16 wherein particles in the cosmetic composition consist of the solid single-crystal, flat, platy particles.
23. (previously presented) The composition of claim 1 wherein the particles further comprise a smooth-crystal facet surface.
24. (previously presented) The composition of claim 16 wherein the particles further comprise a smooth-crystal facet surface.

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X. EVIDENCE APPENDIX

No evidence, pursuant to §§ 1.130, 1.131 and/or 1.132, is submitted herewith.

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XI. RELATED PROCEEDINGS APPENDIX

No decisions rendered by a Court or the Board have been made; therefore, no such decisions are submitted herewith.